Supreme Court, U. S.
FILED
DEC 30 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1976

76-1050

NO. 76-

JEROME J. CAPLAN,

Petitioner,

v.

FRANK A. HOWARD, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Counsel for Petitioner:

LOUIS M. JEPEWAY, JR.
JEPEWAY, GASSEN & JEPEWAY
619 Dade Federal Building
Miami, Florida 33131
305/377-2356

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE PRINCIPLES ENUNCIATED IN THIS COURT'S RECIPROCITY, DUE PROCESS, AND EQUAL PROTECTION DECISIONS	6

INDEX (cont.)

	Page
II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *BERGER v. BOARD OF PSYCHOLOGIST* EXAMINERS, 521 F.2d 1056 (D.C. Cir. 1975)	9
III. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT	12
CONCLUSION	13
CERTIFICATE OF SERVICE	14
APPENDIX	
Opinion of the United States Court of Appeals for the Fifth Circuit	App. 1
Florida Reciprocity Statutes	App. 2

TABLE OF AUTHORITIES

Case	Page
Berger v. Board of Psychologist Examiners, 521 F.2d 1056 (D.C. Cir. 1975)	9, 11
Cleveland Board of Education v. LaFleur, 414 U.S. 634 (1974)	6, 7
Craig v. Boren, ____U.S.____, 45 U.S.L.W. 4057 (1976)	8
Fuentes v. Shevin, 407 U.S. 67 (1972)	7
Goldberg v. Kelly, 397 U.S. 254 1970)	7
Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926)	7
Grannis v. Ordeon, 234 U.S. 385 (1914)	7
Great Atlantic & Pac. Tea Co., Inc. v. Cottrell, ____U.S.____, 96 S.Ct. 923 (1976)	6
McLaughlin v. Florida, 379 U.S. 184 (1964)	8
Reed v. Reed, 404 U.S. 71 1971)	7

TABLE OF AUTHORITIES (cont.)

Case	Page
Rinaldi v. Yeager, 384 U.S. 305 (1966)	8
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	6
Snidach v. Family Finance Corp., 395 U.S. 337 (1969)	7
Stanley v. Illinois, 405 U.S. 642 (1972)	7
Stanton v. Stanton, 421 U.S. 7 (1975)	7
Vlandis v. Kline, 412 U.S. 441 (1973)	7, 9
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
Amendment XIV, Constitution of the United States	3
Section 1, Article I, Rules Relating to Admission to the Florida Bar	3, 4

In the Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-

JEROME J. CAPLAN,

Petitioner,

v.

FRANK A. HOWARD, ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jerome J. Caplan, seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the District Court's order granting summary judgment to the Respondents.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's order granting summary judgment for the Respondents is an unreported opinion and appears in the Appendix, *infra*. It was entered on October 1, 1976.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 1, 1976. This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1). This Petition for Writ of Certiorari is filed within 90 days of the judgment below. 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Does the nature of the Federal Union demand that Florida extend reciprocity to an out-of-state attorney, who has met standards equal to Florida's in his state of licensure?

2. Do Florida's denial of reciprocity to an out-of-state attorney and its requirement that he take and pass the Florida Bar examination, which has no relationship whatsoever to his ability to practice law in Florida, when he has met standards equal to those of Florida in the state of his licensure, deprive the attorney of his right to practice law in violation of the due process and equal protection clauses of the Fourteenth Amendment?

3. Do Florida's denial of reciprocity to an out-of-state attorney and its requirements that he take and pass

the Florida Bar examination, which has no relationship whatsoever to his ability to practice law in Florida, when he has met standards equal to those of Florida in the state of his licensure and Florida extends reciprocity to other professionals deprive the attorney of his right to practice law in violation of the equal protection clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> ". . . Nor shall any state deprive any person of life, liberty, or property without due process of law . . ."
>
> ". . . Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws . . ."

Section 1, Article I, Rules Relating to Admission to the Florida Bar:

> "All individuals who seek the privilege of practicing law in the State of Florida shall submit to the Bar Examination."

Florida statutes relating to reciprocity are included in the appendix to this petition.

STATEMENT OF THE CASE

The Petitioner filed suit against the Respondents and challenged the validity of Section 1 of Article I of the Rules Relating to Admission to the Florida Bar. The Petitioner is an American citizen, a member of the Bar of this Court, of the Maryland Bar*, of the Bar of the United States Court of Appeals for the Fifth Circuit and of the United States Court of Claims.

The Respondents are members of the Florida State Board of Bar Examiners and are charged with the responsibility of enforcing the rules relating to admission to the Florida Bar, with the responsibility of preparing, conducting and grading the Florida Bar Examination, and with the responsibility of accepting or rejecting applicants for membership in the Florida Bar.

The Petitioner sought a declaratory judgment declaring that the denial of reciprocity to him and the requirement that he take and pass the Florida Bar Examination was unconstitutional, illegal, null and void; a declaratory judgment declaring Section 1 of Article I of the Rules Relating to Admission to the Florida Bar unconstitutional, illegal, null and void as applied to the Petitioner; and an injunction requiring the Respondents to admit the Petitioner to membership in the Florida Bar.

The Petitioner consented to the Florida Bar's motion for leave to intervene.

*The standards for admission to the Maryland Bar are at least as high as those for admission to the Florida Bar.

Examination of the last six Florida Bar examinations, prior to the filing of the complaint, revealed the following: the 1974 third examination had only two questions realing with Florida law; one dealt with Florida constitutional law, the other dealt with the Florida Rules of Civil Procedure. The 1974 second examination was identical concerning Florida law. Questions on contracts, criminal law and procedure, evidence, real property and torts were tested under the Multistate Bar Examination. The 1974 first examination was identical both as to Florida law and the areas covered by the Multistate Bar Examination. The 1973 summer examination had one question on Florida constitutional law and one question on the Florida Rules of Civil Procedure. The 1973 spring examination had one question on the Florida Rules of Civil Procedure. Questions on contract, on criminal law and procedure, evidence, real property and torts were tested under the Multistate Bar Examination. The 1973 winter examination was identical.

In response to the Respondents' Motion for Summary Judgment, the Petitioner submitted, in effect, the affidavit of an expert which stated that he was prepared to testify that the Florida Bar Examination does not properly test the ability of an applicant to practice law in Florida, who has been admitted to practice law in another state.

The District Court granted the Respondents' Motion for Summary Judgment. The United States Court of Appeals for the Fifth Circuit summarily affirmed. This petition followed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE PRINCIPLES ENUNCIATED IN THIS COURT'S RECIPROCITY, DUE PROCESS, AND EQUAL PROTECTION DECISIONS.

In *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, —— U.S. —— 96 S.Ct. 923 (1976), this Court invalidated a Mississippi regulation which provided that milk and milk products from another state could be sold in Mississippi only if the other state accepted milk and milk products produced and processed in Mississippi on a reciprocal basis. This Court held that even if this regulation enabled it to insure that the reciprocating state's health standards were as high as Mississippi's, there were less restrictive alternatives available, which were less burdensome on commerce, to serve this interest. 96 S.Ct. at 930. The doctrine of the "least restrictive alternative" to achieve governmental objectives was confirmed in *Cleveland Board of Education v. LaFleur*, 414 U.S. 634, 647 (1974).

Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1957), held that a state could not exclude anyone from the practice of law in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. The Respondents, rather than employing the least restrictive alternative, employed the most restrictive alternative, the Florida Bar Examination, to test the ability of an out-of-state attorney to practice law in Florida.

This requirement also creates an unconstitutional irrebuttable presumption that until an out-of-state attorney takes and passes the Florida Bar Examination, he is unfit to practice law in Florida. This Court has consistently invalidated permanent irrebuttable presumptions. *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 642 (1972); *Cleveland Board of Education v. LaFleur*, *supra*.

Due process requires that an attorney who is licensed to practice law in another state must be given an opportunity to establish that a "less restrictive alternative" than the Florida Bar Examination should be utilized to determine his fitness to practice law in Florida. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926); *Grannis v. Ordeon*, 234 U.S. 385 (1914); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

Florida grants reciprocity to certified public accountants, to architects, to registered nurses, to osteopaths, to psychologists, to licensed practical nurses, and to veterinarians, upon a showing that they have met standards equal to Florida's in their state of licensure. Florida refuses to extend this opportunity to attorneys. This discrimination violates the equal protection clause, even under the "traditional" equal protection test. *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Stanton v. Stanton*, 421 U.S. 7 (1975). Florida's denial of such an opportunity to attorneys while granting it to other professionals is inescapably contrary to the equal protection clause. *Stanley v. Illinois*, 405 U.S. at 658.

The circumstance that all persons who desire to practice law in Florida must take and pass the Florida Bar examination does not end the equal protection inquiry. Equal application of a law does not mean that it satisfies equal protection:

> "The Equal Protection clause requires more of a state law than non-discriminatory application within the class it establishes. . ." (*Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966))

Thus, "Judicial inquiry under the Equal Protection clause . . . does not end with a showing of equal application among the members of the class defined by the legislation . . ." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Therefore, the ". . . manifest inadequacy of any approach requiring only equal application to the class defined in the statute . . ." *Id*, at 190, n.8, is apparent. If an attorney has met standards at least equal to Florida's in obtaining admission to the bar in his state of licensure, it is a violation of equal protection to require him to take and pass the Florida Bar examination, without first giving him an opportunity to establish that he need not take the examination. This is especially true when the Florida Bar examination covers primarily general law, utilizes the Multi-state Bar examination, and thus does not measure the attorney's knowledge of Florida law. Florida's purported attempt to protect the public through this requirement runs afoul of the equal protection clause. *Craig v. Boren*, ——U.S.——, 45 U.S.L.W. 4057, 4060 (1976).

II

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. IN *BERGER v. BOARD OF PSYCHOLOGIST EXAMINERS*, 521 F.2d 1056 (D.C. Cir. 1975)

In *Berger v. Board of Psychologist Examiners*, 521 F.2d 1056 (D.C. Cir. 1975), the Court held that a statutory irrebuttable presumption of professional incompetence, in the absence of a graduate degree in psychology, or a certain number of hours of graduate study in psychology, deprived a practicing psychologist of his right to practice psychology, without due process of law.

The psychologist was qualified, as is the Petitioner, to practice his profession, although he had never been certified or licensed to practice psychology in any other jurisdiction. The licensing authorities ignored the psychologist's qualifications and denied his application for licensure because of his failure to meet the threshold requirement.

The Court noted that ". . . in order to protect his 'liberty' and 'property' interests in his profession, appellant seeks an opportunity to rebut the statutory presumption of his incompetence." 521 F.2d at 1062.

The Court first quoted with approval from *Vlandis:*

> "The state's interest in administrative ease and certainty cannot, in and of itself, save the conclu-

sive presumption from invalidity under the due process clause where there are other reasonable and practicable means of establishing the pertinent facts on which the state's objective is premised." (521 F.2d at 1062)

The Court then held that:

"The principle of *Vlandis* is applicable to the facts of the instant case. A part, and presumably a significant part, of the D.C. licensing process is the administration pursuant to D.C. Code §2-481 of an examination devised by the licensing board to applicants holding a doctoral degree. No reason has been suggested why the board could not fashion a similar examination and substitute passage of that test for the current requirement of passing an examination plus holding a degree . . . on remand, following a declaration by this Court that the statute's irrebuttable presumption does not accord with principles clearly set forth in the case law, the Board could proceed to determine whether Berger's extensive clinical experience, coupled with his limited academic training and apprenticeship, have afforded him a professional competency equivalent to that of a doctor of psychology who has only two years of acceptable post-graduate experience." (521 F.2d at 1062-1063)

Thus:

". . . Whether an applicant previously engaged in the practice of psychology misses the statutory

standard by an inch or a country mile, he must be afforded a fair opportunity to demonstrate his professional skill according to reasonable standards before he is denied the right to continue his practice." (521 F.2d at 1063)

The Court required the Board to fashion an examination to comport with the psychologist's individual circumstance:

". . . we remand the case to . . . the licensing board to administer to Appellant Berger an examination designed to determine whether his professional skill is commensurate with that of new psychologists being currently licensed under the act. In so doing, we do not act as a legislature to add this requirement to the statute, but rather strike down as unconstitutional that part of the statute which requires an applicant to have an academic credential as well as a certain number of years experience in order to qualify to take a license examination. Only by this action can we remedy the constitutional defect of the statute as it is applied to Berger and to other psychologists without the requisite academic credentials but possibly possessed of the necessary skills." (521 F.2d at 1064).

Berger and this case are irreconcilable. This Court should grant certiorari to resolve the conflict.

III

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

This Court has never before decided whether an attorney who has been admitted to practice law in one state has the Federal constitutional right to the opportunity to establish that the standards that he met in this state of licensure are equal to the standards of the state in which he seeks admission, thus relieving him of the requirement that he take and pass the second state's Bar examination.

This Court, not the court below, should make that decision.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS M. JEPEWAY, JR.

LOUIS M. JEPEWAY, JR.
JEPEWAY, GASSEN & JEPEWAY
619 Dade Federal Building
Miami, Florida 33131
305/377-2356

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been sent to C. Graham Carothers, Esq., P. O. Box 391, Tallahassee, Florida 32302 and to Reginald L. Williams, Esq., 9th Floor, Dade Federal Building, Miami, Florida 33132 on 12/29/76.

LOUIS M. JEPEWAY, JR.

LOUIS M. JEPEWAY, JR.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1090

Summary Calendar*

JEROME J. CAPLAN,
Plaintiff-Appellant,

versus

FRANK A. HOWARD, JR., ET AL.,
Defendants-Appellees.

Appeal for the United States District Court for the
Southern District of Florida

(October 1, 1976)

Before GODBOLD, DYER and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

FLORIDA RECIPROCITY STATUTES

CERTIFIED PUBLIC ACCOUNTANTS

Florida statute 473.19, renumbered to Florida Statute 423.201 in 1969. Certificates Granted to Holders From Other States.

The Board may, in its discretion, issue a certificate as a certified public accountant to any applicant who holds a valid and unrevoked certificate as a certified public accountant issued by, or under the authority of, another state or political subdivision of the United States, or who holds a valid and unrevoked certificate as a chartered accountant issued by, or under the authority of, a foreign country; provided, the applicant has complied with the provisions of this chapter and the rules of the Board. Board shall not be required to issue any certificate under the provisions of this section unless:

(1) The original certificate was secured as the result of an examination which in the judgment of the Board was the equivalent of the standard established by it, and,

(2) The applicant has been engaged in the practice of public accountancy in Florida as a full-time employee of a certified public accountant, as defined in this chapter, for a period of two years, and is a resident, having resided continuously in the state for a period of two years, and,

(3) The state or country issuing the original certificate grant similar privileges to persons holding certificates as certified public accountants issued under the laws of this state, and

(4) The Board is otherwise fully satisfied as to the moral and technical fitness of the applicant.

ARCHITECTS

Florida Statute 467.11. Admission Without Examination.

Hereafter no person shall be admitted to the practice of architecture in this state without an examination except that a certificate of registration may be issued upon filing of application and payment of the same fees as if qualified by examination to a person who meets the requirements of applicants for examination as set forth in §467.08 and has passed a standard examination and holds a current certificate issued by the National Council of Architectural Registration Board and who furnishes satisfactory evidence of continued honorable professional practice after the passing of such examination together with satisfactory evidence of his present ability and integrity. However, applicants who are registered to practice architecture in another state prior to July 1, 1970 shall not be required to hold a professional degree as defined in §467.08(1)(b)5.

REGISTERED NURSES

Florida Statute 464.071. Registered Professional Nurse; License.

* * *

(2) The Board shall issue a license to practice professional nursing without examination, to an applicant who has been duly licensed or registered under the laws of another jurisdiction, if in the opinion of the Board the applicant meets the same standards for licensure required of registered professional nurses in this state . . .

OSTEOPATHS

Florida Statute 459.11. Board May Issue License Without Examination In Certain Instances.

(1) The State Board of Osteopathic Medical Examiners may issue a license without examination to an osteopathic physician who is a graduate of a standard college of osteopathy and who has passed an examination for admission into the medical corps of the United States Army, the United States Navy, or the United States Public Health Service; or who has passed all parts of the examination conducted by the National Board of Examiners for Osteopathic Physicians and Surgeons; provided:

(a) The applicant is of good moral character;

(b) The requirement to practice in the state, territory, country or province in which the applicant is already licensed be equal to those of this state.

(2) The Board shall not issue a license without examination except as hereinbefore in this section provided.

PSYCHOLOGISTS

Florida Statute 490.22. Licensing Under Special Conditions.

* * *

(2) The Board may waive the examination for applicants who present proof of current certification or license in a state which has standards at least equal to those for licensure in Florida and such applicants are entitled to receive a license and a license certificate upon payment of the fees provided for in §490.18.

LICENSED PRACTICAL NURSES

Florida Statute 464.121. License to Practical Nurse; License.

* * *

(2) The Board may issue a license to practice as a licensed practical nurse without examination to any applicant who has been duly licensed or registered as a licensed practical nurse or a person entitled to perform similar services under a different title, under the laws of another jurisdiction, if, in the opinion of the Board the applicant meets the requirements for licensed practical nurse in this state . . .

VETERINARIANS

Florida Statute 474.141. License by Endorsement; Requirements; Void Unless Used.

(1) Subject to the provisions herein contained, the Board shall issue a license by endorsement to practice veterinarian medicine in this state to an appli-

cant who submits a sworn application in proper form, together with a fee of $50, demonstrating that he:

* * *

(e) Is licensed to practice veterinarian medicine in a state that will permit veterinarians licensed in the State of Florida to receive a license by endorsement to practice veterinary medicine in that state . . .